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ROTTA RESEARCH LABORATORIUM S.p.A. & ANOR v. HO TACK SIEN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG J
[CIVIL SUIT NO: D-22IP-2138-2001]
B 11 MARCH 2019

CIVIL PROCEDURE: *Contempt of court – Committal proceedings – Order of injunction – Breach of – Whether injunction final and could not be questioned by any party – Mocking of court judgment and failure to withdraw averments –* C *Whether breach of injunction satisfied beyond reasonable doubt – Whether mitigating factors satisfactory – Sentences – Whether discretionary in nature – Whether custodial sentence warranted*

CIVIL PROCEDURE: *Injunction – Order of injunction – Time period for* D *compliance not specified in order – Whether injunction flawed – Whether breached O. 42 r. 6(1) of Rules of Court 2012 – Whether O. 42 r. 6(1) only applies to mandatory order – Whether restraining judgment subject to O. 42 r. 6(1)*

CIVIL PROCEDURE: *Judgments and orders – Order of court – Enforcement of court order by way of committal proceedings – Senior Assistant Registrar's order –* E *Whether court order requiring doing of act must specify time frame before party subject to court order can be committed for breach – Failure to specify time period for compliance in order – Whether breach of O. 45 r. 5(1)(a), (A), (B), (2) & r. 6(2) of Rules of Court 2012 – Whether court has discretionary power under O. 1A read with O. 2 r. 1(1), (2), and (3) to cure technical non-compliance – Whether curable* F *only if non-compliance had not caused injustice*

The plaintiffs ('applicants') filed a suit against the defendants for, among others, an infringement of a trade make registered in favour of the first plaintiff company and the commission of tort of passing off. The Judicial Commissioner ('JC') allowed the suit and granted injunctions to the G plaintiffs. Upon appeal, the Court of Appeal did not set aside the injunction but set aside certain other orders of the High Court. However, the Federal Court reversed the decision of the Court of Appeal and restored the judgment of the High Court in its entirety. In encl. 147 herein, the applicants applied to court to cite the respondents for contempt of court regarding breach of the H High Court judgment and in encl. 148, the respondents had been cited by the applicants for their failure and/or refusal to comply with an order of the Senior Assistant Registrar ('SAR's order'). The questions that arose in the applications were: (i) whether a restraining injunction is required by O. 42 r. 6(1) of the Rules of Court 2012 ('ROC') to specify a time period for its compliance; (ii) whether the court should exercise its discretion to impose I a custodial sentence for a breach of a restraining injunction; and

(iii) regarding the enforcement of a court order by way of committal proceedings: (a) whether the order was required by O. 45 r. 5(1)(a), (A), (B), (2) and r. 6(2) of the ROC to specify a time period to comply with the order; or was exempted by O. 42 r. 6(2) of the ROC from specifying a time period; and (b) if the order is required to specify a time period and did not specify as such: (1) whether the court should exercise its discretion to cure the omission under O. 1A read with O. 2 r. 1(1), (2), and (3) of the ROC; and (2) whether the court should allow a committal application when an applicant for contempt of court proceedings has an alternative avenue of applying to court under O. 42 r. 6(2) and/or O. 45 r. 6(2) to specify a time period in the order.

Held (allowing encl. 147 and dismissing encl. 148):

(1) The injunction was only a restraining judgment which was not subject to O. 42 r. 6(1) of the ROC. According to O. 42 r. 7(1) of the ROC, the injunction took effect from the date of the High Court judgment and therefore, the respondents were obliged to obey the injunction with effect from the date of judgment. (paras 10 & 11)

(2) If a judgment or order is ambiguous, the ambiguity should be resolved in favour of the alleged contemnor and the judgment/order cannot be enforced by way of committal proceedings. If any party is not certain regarding the scope and application of a judgment/order, the party is at liberty to apply to the court to clarify the scope and effect of the judgment/order. The importance of a clarification application cannot be understated when there is a risk that a party may breach a judgment/order and may be vulnerable to committal proceedings. An objective and literal reading of the injunction did not reveal any vagueness in the injunction. Neither did any of the parties made any clarification. As such, the submission by the respondents that the injunction was ambiguous was rejected. (paras 13-15)

(3) The applicants had satisfied beyond reasonable doubt that the respondents in encl. 147 had committed a breach of injunction. The mitigating factors submitted by the respondents were unacceptable as the respondents were legally represented at all times. In fact, accepting the mitigating factors as valid would provide an unjustifiable *carte blanche* for infringers of registered trade marks and tortfeasors of the tort of passing off in respect of pharmaceutical products. (paras 17 & 20)

(4) In view of the Federal Court's decision, the injunction was final and could not be questioned by any party. However, by way of the averment in their affidavit, the respondents had mocked the judgment of the High Court and the averment was not withdrawn before the sentencing of the respondents. Based on public interest considerations, the court imposed

a fine of RM5,000 each against Mr Hoo and Ms Lee, the directors of the third and sixth defendants respectively, who were both aged more than 82 years. Against the other three contemnors, the court imposed custodial sentence. The first and second defendants, Mr Ho and Ms Chai, were sentenced to two months' imprisonment and Ms Loh, a director of sixth defendant, was sentenced to imprisonment of one month. (paras 21 & 23-25).

(5) The SAR's order requires the delivery of certain information and documents. Based on the definitions of 'immovable property' and 'movable property' in s. 3 of the Interpretation Acts 1948 and 1967, the information and documents envisaged by the SAR's order fell within the meaning of the third category in O. 42 r. 6(2) of the ROC and accordingly O. 42 r. 6(2) applied. A court order requiring a person to do an act must specify a time frame for doing that act before the party subject to the court order can be committed for breaching it (*QU v. QV*). Further, O. 45 rr. 5 and 6 of the ROC are specific provisions regarding the enforcement of a judgment/order by way of contempt of court proceedings while O. 42 r. 6(2) of the ROC is a general provision. In accordance with a canon of construction *generalia specialibus non derogant*, if there is a conflict between two statutory provisions in the same statute, the specific provision should be preferred over the general provision. As the SAR's order did not specify the time period for its compliance, the breach of O. 45 r. 5(1)(a), (A), (B), (2) and r. 6(2) of the ROC constituted a ground to dismiss encl. 148. (paras 31-34)

(6) In contempt of court proceedings, the court has a discretionary power under O. 1A read with O. 2 r. 1(1), (2), and (3) of the ROC to cure a technical non-compliance with ROC which has not caused any injustice. However, the discretion was not exercisable in this case as the omission of a time period to comply with the SAR's order had caused injustice to the respondents. Further, the applicants could have easily applied to court under O. 42 r. 6(2) and/or O. 45 r. 6(2) of the ROC to specify a time period for the respondents to comply with the SAR's order. This alternative avenue was not invoked by the applicants. (para 37)

Case(s) referred to:

Dato' Andrew Kam Tai Yeow v. Dato' Kam Woon Wah & Ors [2018] 1 LNS 1301 HC ***(refd)***

Juris Technologies Sdn Bhd & Anor v. Foo Tiang Sin & Ors [2018] 1 LNS 790 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

QU v. QV [2008] 2 SLR 702 ***(refd)***

Tan Kang Ho v. Mao Sheng Marketing (M) Sdn Bhd & Ors [2015] 4 CLJ 113 HC ***(refd)***

Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Another Appeal [1995] 4 CLJ 427 SC ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, ss. 2(1)(e), 3
Rules of Court 2012, O. 1A, O. 2 r. 1(1), (2), (3), O. 42 r. 6(1), (2), 7(1), O. 45 rr. 5(1)(a), (A), (B), (2), 6(2), O. 52 r. 9

Rules of Court [Sing], O. 42 r. 6(1), (2), O. 45 rr. 5(1), (2), 6

For the applicants - Suaran Singh Sidhu & Anne Ng Yuin Yuin; M/s Koh Dipendra Jeremiah Law
For the respondents - Hoo Lin Coln & Terence Philips; M/s Lin Coln & Co

Reported by S Barathi

JUDGMENT
(encl. 147 & 148)

Wong Kian Kheong J:

Two applications

[1] This judgment concerns the following two applications (two applications) by the plaintiff companies (applicants):

(i) in court encl. no. 147 (encl. 147), the applicants apply to court to cite the following respondents (respondents (encl. 147)) for contempt of court regarding the breach of a judgment of Mah Weng Kwai JC (as he then was) dated 18 February 2011 (High Court's judgment):

(a) Mr Ho Tack Sien (Mr Ho), the first defendant in this case. Mr Ho is a director of the third defendant company (third defendant) and sixth defendant company (sixth defendant);

(b) Ms Chai Yuet Ying (Ms Chai), the second defendant in this case. Ms Chai is Mr Ho's wife as well as a director of the third and sixth defendants;

(c) Mr Hoo Kiow @ Mr Ho Fatt (Mr Hoo), a director of the third defendant;

(d) Ms Lee Yoke Thai (Ms Lee). Ms Lee is a director of the sixth defendant; and

(e) Ms Loh Mee Yin (Ms Loh), a director of the sixth defendant; and

(ii) in court encl. no. 148 (encl. 148), the following respondents (respondents (encl. 148)) have been cited by the applicants for their failure and/or refusal to comply with an order dated 6 November 2015 of the learned Senior Assistant Registrar (SAR's order):

(a) Mr Ho;

(b) Ms Chai;

(c) Mr Hoo;

(d) Mr Ong Ban Seng (Mr Ong), a director of the fifth defendant company (fifth defendant);

(e) Mr Lee Soo Chieng (Mr Lee). Mr Lee is a director of the fifth defendant;

(f) Mr Ulrich Max Albrecht Buchholtz (Mr Ulrich), a director of the fifth defendant;

(g) Ms Lee; and

(h) Ms Loh.

[2] On 14 August 2018, the applicants' learned counsel, Mr Suaran Singh, applied for leave of court to discontinue encl. 148 against Mr Ong, Mr Lee and Mr Ulrich (three alleged contemnors) with no order as to costs. I then struck out encl. 148 against the three alleged contemnors without any liberty to file afresh and with no order as to costs. I did not give the applicants liberty to file afresh encl. 148 against the three alleged contemnors because committal proceedings involve the fundamental liberty and the good name of the three alleged contemnors. Accordingly, the threat of contempt of court should not be left hanging indefinitely over the heads of the three alleged contemnors like a sword of Damocles.

Issues

[3] The following questions arise in the two applications:

(i) whether a restraining injunction is required by O. 42 r. 6(1) of the Rules of Court 2012 (RC) to specify a time period for its compliance;

(ii) should the court exercise its discretion to impose a custodial sentence for a breach of a restraining injunction in this case?; and

(iii) regarding the enforcement of a court order (which requires a party to deliver information and documents) by way of committal proceedings:

(a) whether the order:

(1) is required by O. 45 rr. 5(1)(a), (A), (B), (2) and 6(2) of the RC to specify a time period to comply with the order (time period); or

(2) is exempted by O. 42 r. 6(2) of the RC from specifying a time period; and

(b) if the order is required to specify a time period and does not specify as such:

(1) should the court exercise its discretion to cure the omission under O. 1A read with O. 2 r. 1(1), (2) and (3) of the RC?; and

(2) whether the court should allow a committal application when an applicant for contempt of court proceedings has an alternative avenue of applying to court under O. 42 r. 6(2) and/or O. 45 r. 6(2) of the RC to specify a time period in the order.

Enclosure 147

Applicants' Case

[4] The applicants have filed this suit against the defendants (this suit) for, among others:

(i) an infringement of a trade mark, "Viartril-S", registered in favour of the first plaintiff company (registered trade mark); and

(ii) the commission of a tort of passing off.

[5] After a trial, Mah Weng Kwai JC allowed this suit and the High Court's judgment granted, among others, the following injunction (injunction):

(i) an injunction to restrain the third, fifth and sixth defendants from, among others, manufacturing, distributing and offering to sell "Artril 250" products (Artril products) or similar products which infringe the registered trade mark; and

(ii) an injunction to restrain the third, fifth and sixth defendants from, among others, passing off Artril products as the products of the applicants (Viatril products).

[6] The defendants appealed to the Court of Appeal against the High Court's judgment. The Court of Appeal did not set aside the injunction but set aside certain other orders of the High Court (Court of Appeal's decision). On 7 April 2015, the Federal Court reversed the Court of Appeal's decision and restored the High Court's judgment in its entirety (Federal Court's decision).

[7] In support of encl. 147, the following evidence had been adduced by the applicants:

(i) the applicants had engaged persons to purchase Artril products from various pharmacies (applicants' purchases);

(ii) the applicants' purchases were made after the High Court's judgment as well as after the Federal Court's decision; and

(iii) documentary evidence regarding the applicants' purchases had been exhibited in the applicants' affidavit in support of encl. 147.

Defence Of Respondents (Encl. 147)

[8] Mr Hoo Lin Coln, learned counsel for the respondents (encl. 147), has opposed encl. 147 on the following grounds:

(i) the injunction has breached O. 42 r. 6(1) of the RC by not specifying a time period for its compliance; and

(ii) the injunction is "flawed" because of its ambiguity.

Mr Hoo Lin Coln has cited various cases in support of the above contentions.

Whether Injunction Has To Comply With O. 42 r. 6(1) of the RC

[9] Order 42 rr. 6 and 7(1) of the RC provide as follows:

> **Judgment requiring act to be done: Time for doing it**
>
> O. 42 r. 6(1) Subject to paragraph (2), **a judgment or order which requires a person to do an act shall specify the time after service of the judgment or order, or some other time, within which the act is to be done**.
>
> r. 6(2) **Where the act which any person is required by any judgment or order to do is to** pay money to some other person, give possession of any immovable property or *deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order in accordance with paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly*.
>
> **Date from which judgment** or order **takes effect**
>
> O. 42 r. 7(1) **A judgment** or order **of the Court takes effect from the day of its date**.
>
> (emphasis added).

[10] Firstly, I am not able to accept Mr Hoo Lin Coln's reliance on O. 42 r. 6(1) of the RC because that provision only applies to a mandatory judgment or order which "requires a person to do an act". The injunction in this case is only a restraining judgment which is not subject to O. 42 r. 6(1) of the RC. Our O. 42 r. 6 of the RC is substantially similar to O. 42 r. 6 of Singapore's Rules of Court [RC (Singapore)] which provides as follows:

> **Judgment**, etc., **requiring act to be done: Time for doing it**
>
> O 42 r 6(1) Subject to paragraph (2), **a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time, within which the act is to be done**.
>
> 6(2) **Where the act which any person is required by any judgment or order to do is** to pay money to some other person, give possession of any immovable property or *deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order by virtue of paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly*.
>
> (emphasis added).

The above interpretation of O. 42 r. 6(1) of the RC is supported by the following judgment of Chan Sek Keong CJ in Singapore's Court of Appeal (its apex court) in *QU v. QV* [2008] 2 SLR 702, at [21] regarding, among others, O. 42 r. 6 of the RC (Singapore)]:

> [21] But, *in our view, there is a great difference between being required to abstain from doing an act altogether and being required to do an act within a specified time. In the former scenario, time is not critical because the failure to abstain from doing the act at any time is a breach of the order. In the latter scenario, however, the party has not been told by when he must do the act. Imputing a reasonable time to the doing of the act does not help because whether or not there is a breach depends on what the court considers to be reasonable. In short, to commit a person to gaol or to a fine for breaching an order of court that lacks certainty is contrary to our established notions of justice. …*"
>
> (emphasis added).

[11] There is another reason why I am not able to accept the above contention by Mr Hoo Lin Coln. According to O. 42 r. 7(1) of the RC, the injunction (part of the High Court's judgment) takes effect from the date the High Court's judgment is made (18 February 2011) - please see *Dato' Sri Andrew Kam Tai Yeow v. Tan Sri Dato' Kam Woon Wah & Ors* [2018] 1 LNS 1301; [2018] MLJU 1204, at [13] and [14]. In other words, the respondents (encl. 147) are obliged to obey the injunction with effect from 18 February 2011.

[12] All the cases cited by Mr Hoo Lin Coln did not concern a restraining injunction (as in this case).

Is Injunction Equivocal?

[13] If a judgment or order (judgment/order) is ambiguous, the ambiguity in the judgment/order should be resolved in favour of the alleged contemnor and the judgment/order cannot be enforced by way of committal proceedings - please see *Tan Kang Ho v. Mao Sheng Marketing (M) Sdn Bhd & Ors* [2015] 4 CLJ 113; [2015] 5 AMR 146, at [37(b)], [38], [42] and [43]. The decision in *Tan Kang Ho* has been affirmed by the Court of Appeal.

[14] If any party is not certain regarding the scope and application of a judgment/order, the party is at liberty to apply to the court (which has pronounced the judgment/order) to clarify the scope and effect of the judgment/order (clarification application). The importance of a clarification application cannot be understated when there is a risk that a party may breach a judgment/order and may be vulnerable to committal proceedings.

[15] An objective and literal reading of the injunction does not reveal any vagueness in the injunction. None of the parties in this case has made any clarification application. As such, I have no hesitation to reject Mr Hoo Lin Coln's submission that the injunction is ambiguous.

Whether Respondents (Encl. 147) Have Breached Injunction

[16] It is not disputed that the applicants bear the legal burden to prove beyond all reasonable doubt that the respondents (encl. 147) have breached the injunction (as directors of the third and/or sixth defendants) by allowing the third and sixth defendants to sell Artril products (breach of injunction) - please see Wan Adnan FCJ's (as he then was) judgment in the majority decision of the Federal Court in *Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Another Appeal* [1995] 4 CLJ 427; [1995] 3 MLJ 549, at 574.

[17] I have considered all the affidavits filed on behalf of the respondents (encl. 147) and their written submission. Based on the applicants' purchases, I am satisfied beyond all reasonable doubt that the respondents (encl. 147), as directors of the third and/or sixth defendants, have committed a breach of injunction by allowing the third and sixth defendants to sell Artril products.

What Is Appropriate Sentence For Breach Of Injunction?

[18] After finding the respondents (encl. 147) guilty of a breach of injunction on 14 August 2018, I gave time to all the learned counsel to prepare their submission regarding the appropriate sentence to be meted out to the respondents (encl. 147) for the breach of injunction. The sentencing date was then fixed on 26 September 2018.

[19] The plea in mitigation (mitigation) by the respondents (encl. 147) is as follows:

(i) the respondents (encl. 147) are "extremely remorseful" for the breach of injunction and tender their apology;

(ii) the respondents (encl. 147) did not intend to commit the breach of injunction because they "sincerely thought" Artril products were different from Viatril products (alleged mistake);

(iii) the Ministry of Health has approved the names and packaging of Artril products (MOH's approval). The respondents (encl. 147) claim that they would have not committed the breach of injunction if not for MOH's approval;

(iv) before the breach of injunction, the respondents (encl. 147) have not committed any act which interferes with the administration of justice;

(v) both Mr Hoo and Ms Lee are 82 years of age; and

(vi) the respondents (encl. 147) undertake not to repeat any further breach of the injunction or commit any similar act in the future.

[20] Firstly, I cannot accept the alleged mistake and MOH's approval as valid mitigating factors. This is because, the respondents (encl. 147) are legally represented at all times. If respondents (encl. 147) were uncertain regarding the ambit and effect of the injunction, they could have easily sought legal advice. There was no evidence that the respondents (encl. 147) had inquired from their solicitors and learned counsel regarding the scope and application of the injunction. Nor had the respondents (encl. 147) made any clarification application.

If I have accepted the alleged mistake and MOH's approval as valid mitigating factors in this case, this will provide an unjustifiable *carte blanche* for infringers of registered trade marks and tortfeasors of the tort of passing off in respect of pharmaceutical products, to evade their just punishment for disobedience to injunctions regarding those products.

[21] I do not find that there is genuine remorse by Mr Ho, Ms Chai and Ms Loh because paras. 18 and 23 of the affidavit affirmed by Ms Chai on 21 December 2017 (filed on behalf of Mr Ho, Ms Chai and Ms Loh) had alleged as follows (in its original language) (averment):

> 18. *Saya dengan rendah hati ingin memaklumkan kepada Mahkamah yang Mulia ini bahawanya, saya sememangnya langsung tidak berpuas hati dengan keputusan Yang Arif Mah Weng Kwai tersebut, oleh kerana keputusan Yang Arif Mah Weng Kwai tersebut adalah tidak praktikal dan tidak mungkin dapat dipuas hatikan* (satisfied).
>
> …
>
> 23. *Daripada penjelasan di atas, adalah jelas bahawa keputusan dan perintah Yang Arif Mah Weng Kwai sememangnya adalah tidak praktikal memandangkan keadaan sekarang*.
>
> (emphasis added).

In view of the Federal Court's decision, the injunction is final and cannot be questioned by any party in this case. Yet, Mr Ho, Ms Chai and Ms Loh had the audacity to mock the High Court's judgment by way of the averment. Worse still, the averment was not withdrawn before the sentencing of the respondents (encl. 147).

[22] The court has a wide discretion to sentence a contemnor - please see *Juris Technologies Sdn Bhd & Anor v. Foo Tiang Sin & Ors* [2018] 1 LNS 790; [2018] 8 AMR 250, at [25].

[23] In sentencing the respondents (encl. 147), the primary consideration is public interest - *Juris Technologies*, at [28(a)]. It is not in the public interest to impose a custodial sentence on Mr Hoo and Ms Lee because:

(i) Mr Hoo and Ms Lee are senior citizens (both are more than 82 years of age); and

(ii) there are medical reports that Mr Hoo and Ms Lee are suffering from ailments. The applicants have not disputed the veracity of these medical reports.

In view of the above exceptional reasons:

(i) pursuant to O. 52 r. 9 of the RC, I imposed a fine of RM5,000 each on Mr Hoo and Ms Lee (fine); and

(ii) I refrain from ordering any imprisonment in default of payment of the fine. In view of the advanced age of Mr Hoo and Ms Lee as well as their medical problems, any imprisonment sentence, including a default imprisonment order, may be detrimental to them.

The above exceptional reasons justify a disparity in the sentence imposed on Mr Hoo and Ms Lee as compared to the sentence which is meted out to the other respondents (encl. 147) (please see below).

[24] I exercise my discretion to impose a custodial sentence (custodial sentence) on Mr Ho, Ms Chai and Ms Loh (three contemnors) due to the following reasons:

(i) public interest requires, if not demands, all parties to obey a judgment/order, especially when the judgment/order has been decided by our highest court. In this case, the injunction has been affirmed by the Court of Appeal and Federal Court. Public interest should override the mitigation in this case;

(ii) this case concerns intellectual property rights (IPR) of the applicants. After our apex court has conclusively decided that an owner of IPR can enforce the IPR by way of, among others, a restraining injunction, it is in the public interest for the injunction to be obeyed by an infringer of the IPR (infringer). A custodial sentence for a breach of an injunction (which enforces IPR) deters infringers and like-minded persons from breaching the injunction with impunity (public deterrence). Public deterrence is important to promote the development and enforcement of IPR in this country. Public deterrence clearly supports a custodial sentence in this case;

(iii) the breach of injunction in this case is not an isolated or a technical breach of a judgment/order. The sales of Artril products are purely commercial activities conducted over a long period of time with the sole motive of profit. There is no altruistic purpose involved in this case which can provide a valid mitigation for the three contemnors; and

(iv) the averment constitutes an aggravating factor which supports the custodial sentence.

[25] In respect of the length of the custodial sentence:

(i) Mr Ho and Ms Chai are the first and second defendants in this case. They knew about the injunction from the date of the High Court's judgment and had exhausted their right to appeal against the High Court's judgment in the Court of Appeal and Federal Court. Accordingly, two months' imprisonment in my view is an appropriate sentence for them in the public interest; and

(ii) as for Ms Loh, a lower imprisonment sentence of one month is appropriate in the public interest because she is only a director of the sixth defendant.

Stay Of Execution Of Custodial Sentence

[26] After I have pronounced the custodial sentence, Mr Hoo Lin Coln orally applied for a stay of execution of the custodial sentence (stay) pending the disposal of the appeal by the three contemnors to the Court of Appeal against the custodial sentence. In the finest tradition of the bar, Mr Suaran Singh did not object to the stay application.

[27] I granted the stay subject to the following condition:

(i) a surety (other than Mr Ho and Ms Chai) provides to the court a bond sum of RM15,000 each for Mr Ho and Ms Chai; and

(ii) a surety (other than Ms Loh) provides a bond sum of RM10,000 to the court for Ms Loh.

Enclosure 148

Whether SAR's Order Should Specify Time Period

[28] The relevant parts of O. 45 rr. 5(1), (2) and 6 of the RC state as follows:

> **Enforcement of judgment to do** or abstain from doing **an act**
>
> O. 45 r. 5(1) **Where**:
>
> (a) **a person required by** a judgment or **order to do an act within a time specified in the** judgment or **order refuses or neglects to do it within that time** or, as the case may be, within that time as extended or abridged under Order 3 rule 5; …
>
> then, **subject to these Rules, the** judgment or **order may be enforced by one or more of the following means**:
>
> (A) **with the leave of the Court, an order of committal**;
>
> (B) **where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body**; …

A 5(2) **Where a** judgment or **order requires a person to do an act within a time therein specified and an order is subsequently made under rule 6 requiring the act to be done within some other time, references in paragraph (1) to a judgment or order shall be construed as references to the order made under rule 6**.

B …

Judgment or **order requiring act to be done**: **Order fixing time for doing it**

O 45 r. 6(1) **Notwithstanding that a** judgment or *order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without* C *prejudice to Order 3 rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein.*

6(2) **Where, notwithstanding Order 42 rule 6(1), or by reason of Order 42 rule 6(2), a** judgment or *order requiring a person to do an act does not specify* D *a time within which the act is to be done the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.*

6(3) An application for an order under this rule shall be made by notice of application and such notice of application shall, notwithstanding anything in Order 62 rule 10, be served on the person required to do the E act in question.

(emphasis added).

[29] I reproduce below the relevant parts of O. 45 rr. 5 and 6 of the RC (Singapore):

F **Enforcement of judgment to do or abstain from doing an act**

O 45 r 5(1) **Where**:

(a) **a person required by a** judgment or **order to do an act within a time specified in the** judgment or **order refuses or neglects to do it within that time** or, as the case may be, within that time as extended or abridged G under Order 3 Rule 4; …

then, **subject to these Rules, the** judgment or **order may be enforced by one or more of the following means**:

(i) **with the leave of the Court, an order of committal**;

H (ii) **where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body**; …

5(2) **Where** a judgment or *order requires a person to do an act within a time therein specified and an order is subsequently made under Rule 6 requiring the act* I *to be done within some other time, references in paragraph (1) to a judgment or order shall be construed as references to the order made under Rule 6.*

…

Judgment, etc. **requiring act to be done: Order fixing time for doing it**

O 45 r 6(1) *Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3, Rule 4, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein.*

6(2) **Where, notwithstanding Order 42, Rule 6(1), or by reason of Order 42, Rule 6(2), a** judgment or *order requiring a person to do an act does not specify a time within which the act is to be done, the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.*

…

(emphasis added).

[30] The SAR's order is clearly a mandatory order which falls within O. 42 r. 6(1) of the RC. Order 42 r. 6(1) of the RC is subject to O. 42 r. 6(2) of the RC. Order 42 r. 6(2) of the RC applies to the following three acts which are required to be done by a judgment/order:

(i) payment of money;

(ii) the giving of possession of "immovable property"; and

(iii) the delivery of "movable property".

[31] The RC have been made under the Courts of Judicature Act 1964 which has been revised under the Revision of Laws Act 1968. Accordingly, Part I of the Interpretation Acts 1948 and 1967 (IA) applies to RC - please see s. 2(1)(e) of the IA. Section 3 of the IA (in Part 1 IA) provides the following definitions of "immovable property" and "movable property":

"immovable property" means land and any interest in, right over or benefit arising or to arise out of land;

"movable property" means all property other than immovable property;"

(emphasis added).

The SAR's order requires the delivery of certain information and documents. Based on the definitions of "immovable property" and "movable property" in s. 3 of the IA, I am of the view that information and documents envisaged by the SAR's order fall within the meaning of the third category in O. 42 r. 6(2) of the RC (delivery of "movable property"). Accordingly, O. 42 r. 6(2) of the RC applies to the SAR's order.

[32] The question that arises is whether the SAR's order:

(i) is required by O. 45 rr. 5(1)(a), (A), (B), (2) and 6(2) of the RC to specify a time period to comply with the SAR's order; or

(ii) is exempted by O. 42 r. 6(2) of the RC from specifying a time period for compliance with the SAR's order?

I am not able to find any Malaysian case which has decided the above issue. Our O. 42 r. 6(1), (2), O. 45 r. 5(1) and (2) of the RC are substantially similar to O. 42 r. 6(1), (2), O. 45 r. 5(1) and (2) of the RC (Singapore). Hence, my reliance on *QU* which has decided as follows, at [12] to [16] and [19]:

> [12] **In our view, O 42 r 6 [RC (Singapore)] has to be read with O 45 r 6 to determine its scope.** …
>
> [13] *Order 42 rule 6 [RC (Singapore)] corresponds with O 42 r 2 of the former Rules of the Supreme Court 1965 (SI 1965 No 1776) (UK) ("the RSC"), the scope of which was described in Nigel Lowe & Brenda Sufrin, The Law of Contempt (Butterworths, 3rd Ed, 1996) at pp. 604-605 as follows*:
>
> > By this rule [ie, O. 45 r. 5 of the RSC, the English equivalent of O. 45 r. 5 of the Rules of Court] the courts have identical powers to enforce both positive and negative orders but the **coercive methods of enforcing a positive order can only be exercised where that order specifically expresses the time within which the act must be done**. Normally such positive orders will specify a time within which an act must be done, and indeed the courts are obliged to specify a time under O. 42 r. 2(1). However, *by O. 42 r. 2(2), no time limit need be specified in respect of an order or judgment requiring a person to pay money to some other person, or to give possession of any land or to deliver goods. In practice such orders will not normally specify any time limit and accordingly they cannot be enforced by sequestration or committal. However, where the original order does not specify a time limit (and this includes not only orders or judgments requiring persons to pay money to some other person, etc under O. 42 r. 2(2), but also other orders which either through inadvertence or omission have not complied with O. 42 r. 2(1)), the courts are empowered to make a further order requiring the act to be done within a stated time. This subsequent order can be enforced by sequestration or committal, and accordingly where it is thought necessary so to enforce orders for giving possession of land or for the delivery of goods, the procedure to adopt is to apply for this subsequent order*.
>
> [14] **A similar approach was taken in *Kumari v. Jalal* [1997] 1 WLR 97 where the Court of Appeal in England said** (at 101):
>
> > Where there is a dispute about property, a court can decide the question of title and can make an order for delivery up of the property. Under the Rules of the Supreme Court it is common not to make an order specifying a time for delivery up: see R.S.C., O. 42 r. 2(2). *But, if it is intended that the order is to be enforced by an order for committal, then it is plain from R.S.C., O. 45 r. 5(1) which is*

substantially the same as C.C.R. [County Court Rules 1981 (SI 1981 No 1687) (UK)], O. 29 r. 1(1) that it is necessary that the order for delivery must set out a date for compliance. If no date for compliance is inserted in the order, then a committal order cannot be made.

[15] ***Singapore Civil Procedure 2007*** **(G P Selvam ed) (Sweet & Maxwell Asia, 2007) contains a passage to the same effect. At para 45/5/1, it is noted**:

The effect of the qualification [to require a time to be specified] is that a judgment or order to pay money to some other person or to give possession of immovable property or to deliver property which need not, and will not as a general rule, specify the time within which such act is required to be done (see O. 42 r. 6(2)) will not come under this rule, and so will not be enforceable by order of committal, unless and until time is specified for the doing of that [a]ct …

[16] *Section 52 of the Interpretation Act provides that "[w]here no time is prescribed or allowed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises". In our view, s. 52 is not intended to apply to a judgment or order, the breach of which will expose the party in default to committal proceedings; otherwise, O. 45 rr. 5(1)(a), 5(2) and 6(2) of the Rules of Court would be rendered redundant.*

…

[19] *There appears to be no local judicial decision on the question whether a party can be punished for contempt of court for disobeying a court order directing him to do a positive act (such as the acts to be done by the appellant under the Ancillary Order in the present appeal) where that court order does not specify a time for doing the act in question. However, in our view, the answer seems obvious as a matter of law and justice in the context of the power to punish a person for contempt of court by imprisonment or imposition of a penalty. It is contrary to all notions of justice that a person could or should be punished for omitting to do an act stipulated in a court order when he does not know or is not certain when such omission constitutes a breach of the court order. In the present case, it is true that the appellant had plenty of time to deliver the child's birth certificate to the respondent, but, in our view, the meaning of O. 45 r. 5(1)(a) should not be determined on the facts of a specific case. That rule is explicit in its prescription that a court order requiring a person to do an act must specify a time frame for doing that act before the party subject to the court order can be committed for breaching it.*

(emphasis added).

[33] I accept the interpretation of O. 42 r. 6, O. 45 rr. 5 and 6 of the RC (Singapore) (which are substantially similar to our O. 42 r. 6, O. 45 rr. 5 and 6 of the RC) as explained in *QU*. There is another reason for my decision. Order 45 rr. 5 and 6 of the RC are specific provisions regarding the enforcement of a judgment/order by way of contempt of court proceedings while O. 42 r. 6(2) of the RC is a general provision concerning judgments/orders. In accordance with a canon of construction, "*generalia specialibus non*

derogant", if there is a conflict between two statutory provisions in the same statute, the specific provision should be preferred over the general provision - please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, at 758-759.

[34] As explained in the above paras. [32] and [33], in committal proceedings, notwithstanding O. 42 r. 6(2) of the RC, the SAR's order is required by O. 45 rr. 5(1)(a), (A), (B), (2) and 6(2) of the RC to specify a time period to comply with the SAR's order. As the SAR's order did not specify a time period for its compliance, this breach of O. 45 rr. 5(1)(a), (A), (B), (2) and 6(2) of the RC (breach) constitutes a ground to dismiss encl. 148 with costs.

Should Court Cure Breach Under O. 1A And O. 2 r. 1(1) to (3) of the RC?

[35] Order 1A and O. 2 r. 1 of the RC provide as follows:

Regard shall be to justice

O. 1A **In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules**.

Non-compliance with Rules

O. 2 r. 1(1) **Where**, in beginning or purporting to begin any proceedings or *at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings*, or any document, judgment or order therein.

r 1(2) **These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective**.

r 1(3) *The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity*.

(emphasis added).

[36] Mr Suaran has urged me to cure the breach under O. 1A read with O. 2 r. 1(1), (2) and (3) of the RC.

[37] In contempt of court proceedings, the court has a discretionary power under O. 1A read with O. 2 r. 1(1), (2) and (3) RC to cure a technical non-compliance with RC which has not caused any injustice - please see *Tan Kang*

Ho, at [66] and [67]. However, I cannot exercise my discretion in this case to cure the breach pursuant to O. 1A read with O. 2 r. 1(1), (2) and (3) of the RC because:

(i) the omission of a time period to comply with the SAR's order had caused an injustice to the respondents (encl. 148) as they would not know when they were required by the SAR's order to deliver certain information and documents to the applicants. The respondents (encl. 148) should not be left in the dark regarding the time period for them to comply with the SAR's order, especially when a non-compliance of the SAR's order entails penal consequences; and

(ii) the applicants could have easily applied to court under O. 42 r. 6(2) and/or O. 45 r. 6(2) of the RC to specify a time period for the respondents (encl. 148) to comply with the SAR's order (alternative avenue). For reasons best known to the applicants, they did not invoke the alternative avenue.

Effect Of Alternative Avenue

[38] It is decided in *Tan Kang Ho*, at [68], [69] and [72], as follows:

> [68]. In *McLeod v. St Aubyn* [1899] AC 549, at 561, **an appeal from St Vincent and the Grenadines, Lord Morris delivered the opinion of the Privy Council as follows**:
>
> > *The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice.*
>
> (emphasis added).
>
> [69] **The power to punish for contempt of court should be used sparingly and as a last resort in the interest of administration of justice where all other reasonable avenues have failed**.
>
> …
>
> [72] **As the Applicant has a reasonable alternative of complaining to SSM in respect of the Investigative Audit, the Applicant should not have resorted to committal proceedings in this case.**
>
> (emphasis added).

[39] Committal proceedings should only be commenced as a last resort to maintain or vindicate the court's authority when there is no other alternative recourse. In view of the alternative avenue, I dismiss encl. 148 with costs. Needless to say, the applicants have the liberty to resort to the alternative avenue and after due service of the court order (with a time period to deliver

A the requested information and documents), the applicants may commence committal proceedings if there is no delivery of the requested information and documents within the time period stipulated in the order.

Court's Decision

B **[40]** Premised on the above evidence and reasons:

(i) Enclosure 147 is allowed with the following order:

(a) all the respondents (encl. 147) are convicted regarding the breach of injunction;

C (b) Mr Hoo and Ms Lee are each fined RM5,000;

(c) Mr Ho and Ms Chai are each sentenced to two months' imprisonment;

(d) Ms Loh is only ordered to serve one-month imprisonment; and

D (e) subject to allocatur fee, costs of RM20,000 shall be paid by each of the respondents (encl. 147) to the applicants with interest at the rate of 5% per annum on the amounts of costs from 26 September 2018 until the date of full payment of such amounts; and

E (ii) Enclosure 148 is dismissed and the applicants shall pay costs of RM10,000 each to Mr Ho, Ms Chai, Mr Hoo and Ms Lee with interest at the rate of 5% per annum on these sums of costs from 14 August 2018 until the date of full payment of such sums (subject to allocatur fee).

F I did not order costs for Ms Loh because she was not present in court for the hearing of encl. 148 on 14 August 2018 (absence) and upon an application by the applicants, a warrant of arrest was then issued against her (arrest warrant). The arrest warrant was subsequently cancelled by me after she turned up in court on 26 September 2018 and apologised for the absence.

G

H

I